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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA**

Zan Kia Ellertson, et al.,

No. CV-15-00765-PHX-GMS

Plaintiffs,

ORDER

V.

City of Mesa, et al.,

Defendants.

Pending before the Court is Defendants' Motion to Dismiss (Doc. 13) Plaintiffs' first amended complaint ("FAC") pursuant to Federal Rule of Civil Procedure 12(b)(6). For the foregoing reasons, the motion is granted in part and denied in part.

BACKGROUND

Plaintiffs Zan Kia Ellertson, Marianne J. Ellertson, and Ellertson’s Dobson Ranch Mobil, Inc. (“EDRM”)¹ are the registered owners of “Eazy Picken’ Pawn” (“EP Pawn”), “Eazy Title,” and “Eazy Tire and Automotive.” All three businesses are located in Mesa, Arizona. On April 1, 2015, Plaintiffs filed a complaint in the Maricopa County Superior Court against Defendants City of Mesa as the municipal corporation liable for the acts of the Mesa Police Department (“Mesa PD”), Mesa PD Detective Nicholas Lien and his spouse, and Mesa PD Detective Steven Berry and his spouse. On April 27, 2015, Defendants removed the case to this Court. And on May 27, 2015, Plaintiffs filed their FAC. Plaintiffs’ FAC raises nine causes of action: (1) violation of civil rights; (2)

¹ Plaintiffs Zan and Marianne Ellertson are the sole shareholders of EDRM.

1 defamation; (3) false light invasion of privacy; (4) intentional infliction of emotional
2 distress; (5) tortious interference with business expectations; (6) negligence; (7) negligent
3 training and supervision of employees; (8) conversion; and (9) wrongful taking.

4 Plaintiffs' claims arise out of two separate searches and seizures conducted by the
5 Mesa PD. The first incident occurred during a June 20, 2013 traffic stop of non-party
6 Aaron Ellertson ("Mr. Ellertson"), Plaintiffs' Zan and Marianne Ellertson's son and day-
7 to-day manager of EP Pawn. Mr. Ellertson holds no ownership interest in any of
8 Plaintiffs' businesses. Incident to the stop, Detective Lien seized \$100,000 worth of
9 jewelry belonging to EDRM that Mr. Ellertson was transporting for Plaintiffs. Initially,
10 Plaintiffs retained counsel and made numerous unsuccessful efforts to retrieve the
11 jewelry from the Mesa PD. At that time, the Mesa PD refused to return the jewelry
12 because it was being held as evidence.

13 After the traffic stop, Mesa PD continued to investigate Mr. Ellertson. The
14 investigation included the use of undercover detectives who engaged Mr. Ellertson and
15 offered to sell him stolen property while he worked at EP Pawn. At no point did the
16 Mesa PD investigate or implicate the Plaintiffs themselves into Mr. Ellertson's alleged
17 illegal conduct. Mesa PD's reports on the investigation noted that Mr. Ellertson never
18 conducted any of his alleged criminal activity in the presence of Plaintiffs and rather took
19 efforts to conceal his actions and any property obtained through his alleged criminal
20 conduct from them. The reports also noted that Mr. Ellertson kept the majority of his
21 alleged stolen property at his personal residence and not at EP Pawn.

22 A second search and seizure occurred on or about April 2, 2014, when the Mesa
23 PD secured and executed a warrant to search EP Pawn. The search warrant specified
24 certain items to be seized due to their relation to Mr. Ellertson's alleged criminal activity.
25 But the instant complaint alleges that the Mesa PD seized many items that were in no
26 way connected to the alleged crimes and that during the search, Mesa PD seized almost
27 every item over \$20. The FAC further alleges that Mesa PD also breached and destroyed
28 all of EP Pawn's safes and display cases despite possessing the keys necessary to open

1 said cases and safes without damaging them. In total, it alleges that Mesa PD seized
2 more than 1200 items lawfully owned or possessed by Plaintiffs and being sold at the
3 store. The seized property included items in pawn,² Plaintiffs' personal property, and
4 items owned by EDRM.

5 Soon after the incident, the Mesa PD reported the seizure of EP Pawn's property
6 to the local news, describing EP Pawn as ground zero for a gang syndicate in the business
7 of buying and selling stolen property. As a result of the publically reported seizure,
8 customers of EP Pawn with items in pawn sought the return of their property from Mesa
9 PD. Yet, while the Mesa PD possessed all of the seized property, Detective Lien
10 instructed customers to contact the Plaintiffs directly for the return of their property and
11 provided them with Plaintiffs' home phone number and address. Plaintiffs received
12 numerous threatening phone calls from irate customers, and individuals vandalized their
13 home. The FAC alleges that as a result of both a troubling encounter with the Mesa PD
14 during their search of EP Pawn and Mesa PD's damaging public statements, Plaintiff Zan
15 Ellertson suffered emotional and physical distress such as panic attacks, paranoia, and
16 other ailments.

17 On May 19, 2014, Plaintiffs filed a motion to contravene the search warrant in an
18 effort to recover their seized property from the Mesa PD. The next day, the Maricopa
19 County Attorney's Office ("MCAO") filed a notice of seizure for forfeiture and notice of
20 pending forfeiture. On information and belief, Plaintiffs allege that the Mesa PD
21 provided the MCAO false information or withheld exculpatory information related to
22 Plaintiffs' non-participation in and ignorance of Mr. Ellertson's alleged criminal activity.
23 In so doing, the Mesa PD prompted the MCAO to file its action seeking forfeiture of
24 Plaintiffs' property. Plaintiffs opposed the forfeiture action, and on December 26, 2014,
25 the Maricopa County Superior Court entered a partial stipulated judgment ordering all
26 seized property not otherwise claimed by third parties returned to the Plaintiffs. The City
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28 ² Items in pawn are owned by third parties but given as collateral to EP Pawn for loans that are redeemable upon payment of the loan.

1 of Mesa did not comply with the court order for several months. In fact, not until
2 Plaintiffs filed a motion seeking civil contempt against a number of City of Mesa
3 employees were any items returned. Although the City of Mesa has given back most of
4 the seized property, Plaintiffs received some of their items back damaged, other pieces of
5 Plaintiffs' personal property as well as several high value items, including four
6 motorcycles, are unaccounted for, and some items still remain with the Mesa PD on an
7 alleged "evidence hold." Finally, Plaintiffs' business licenses and documents related to
8 Plaintiffs' sale of firearms remain missing.

9 **DISCUSSION**

10 **I. Legal Standard**

11 On a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), all
12 allegations of material fact are assumed to be true and construed in the light most
13 favorable to the nonmoving party. *Cousins v. Lockyer*, 568 F.3d 1063, 1067 (9th Cir.
14 2009). Dismissal under Rule 12(b)(6) can be based on "the lack of a cognizable legal
15 theory" or "the absence of sufficient facts alleged under a cognizable legal theory."
16 *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1990). To avoid
17 dismissal, a complaint need contain only "enough facts to state a claim for relief that is
18 plausible on its face." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). The
19 principle that a court accepts as true all of the allegations in a complaint does not apply to
20 legal conclusions or conclusory factual allegations. *Ashcroft v. Iqbal*, 566 U.S. 662, 678
21 (2009). "Threadbare recitals of the elements of a cause of action, supported by mere
22 conclusory statements, do not suffice." *Id.* "A claim has facial plausibility when the
23 plaintiff pleads factual content that allows the court to draw the reasonable inference that
24 the defendant is liable for the misconduct alleged." *Id.* "The plausibility standard is not
25 akin to a 'probability requirement,' but it asks for more than a sheer possibility that a
26 defendant has acted unlawfully." *Id.* To show that the plaintiff is entitled to relief, the
27 complaint must permit the court to infer more than a mere possibility of misconduct. *Id.*

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1 **II. Analysis**

2 **A. Judicial Notice and Consideration of Extrinsic Evidence**

3 Generally, “a district court may not consider any material beyond the pleadings in
4 ruling on a Rule 12(b)(6) motion.” *Lee v. City of L.A.*, 250 F.3d 668, 688 (9th Cir. 2001)
5 (citation omitted). Two exceptions exist, however. *Id.* First, “[i]f the documents are not
6 physically attached to the complaint, they may be considered if the documents’
7 ‘authenticity . . . is not contested’ and ‘the plaintiff’s complaint necessarily relies’ on
8 them.” *Id.* (citation omitted). Second, pursuant to Federal Rule of Evidence 201, a court
9 may take judicial notice of “matters of public record.” *Id.* (*quoting Mack v. S. Bay Beer*
10 *Distrib.*, 798 F.2d 1279, 1282 (9th Cir. 1986)).

11 Defendant, in its motion to dismiss, attached six exhibits extrinsic to Plaintiffs’
12 FAC. All six exhibits, as Defendants’ point out, are matters of public record, and
13 include: (1) the State of Arizona’s indictment of Mr. Ellertson; (2) the State of Arizona’s
14 direct complaint against Mr. Ellertson; (3) the MCAO’s notice of seizure for forfeiture
15 and notice of pending forfeiture; (4) the state court’s partial stipulated judgment; (5) the
16 State of Arizona’s complaint in civil forfeiture; and (6) the state court’s order to vacate
17 Plaintiffs’ probable cause hearing. Defendants, citing *Mack*, argue that this Court may
18 take notice of all six documents and their contents since they are “matters of public
19 record.” *Mack*, 798 F.2d at 1282.

20 While Defendants are correct that a court may take judicial notice of “matters of
21 public record[,] . . . a court may not take judicial notice of a fact that is ‘subject to
22 reasonable dispute.’” *Lee*, 250 F.3d at 689 (*quoting Fed. R. Evid. 201(b)*). The law thus
23 limits the extent to which this Court may take judicial notice of and consider Defendants’
24 attached exhibits. Although all six exhibits are matters of public record, Plaintiffs dispute
25 the facts underlying some of the documents. Specifically, Plaintiffs challenge the scope
26 of Defendants’ seizure of property from EP Pawn based on and *limited* by a search
27 warrant supported by the factual allegations contained in Mr. Ellertson’s indictment (Ex.
28 1), the State’s direct complaint against Mr. Ellertson (Ex. 2), and the State’s complaint in

1 civil forfeiture (Ex. 5). Thus, since the *existence* of those three documents is undisputed,
2 but the facts contained in them are subject to reasonable dispute, this Court may and does
3 take judicial notice of the *fact* of Mr. Ellertson's indictment, the *fact* that the State of
4 Arizona filed a direct complaint against Mr. Ellertson, and the *fact* that the State of
5 Arizona filed a complaint in civil forfeiture, but nothing more. *See id.* at 689. On the
6 other hand, Plaintiffs do not dispute the remaining three exhibits; thus, this Court takes
7 judicial notice of the MCAO's notice of forfeiture (Ex. 3), the state court's partial
8 stipulated judgment (Ex. 4), and the state court's order to vacate (Ex. 6).

9 **B. Federal Qualified Immunity Related to Plaintiffs' 42 U.S.C. § 1983
10 Claim**

11 Plaintiffs allege a § 1983 claim based on the Mesa PD's search of EP Pawn and
12 seizure of 1200 plus items from Plaintiffs' business. Plaintiffs argue that Defendants'
13 "illegal destruction, seizure, and conversion" of Plaintiffs' property violated their civil
14 rights. Defendants argue that the Mesa PD and detectives Lien and Berry are entitled to
15 qualified immunity from such a claim.

16 Qualified immunity, if found, is "an entitlement not to stand trial or face the other
17 burdens of litigation." *Saucier v. Katz*, 533 U.S. 194, 200 (2001) (internal quotation
18 marks omitted) (citation omitted). In other words, qualified immunity is "an *immunity*
19 *from suit* rather than a mere defense to liability." *Id.* (citation omitted) (emphasis in
20 original). Accordingly, a party's entitlement to qualified immunity should be determined
21 "at the earliest possible stage in litigation." *Id.* at 201 (citation omitted).

22 Qualified immunity involves a two-step analysis. First, "[t]aken in the light most
23 favorable to the party asserting the injury, do the facts alleged show the officer's conduct
24 violated a constitutional right?" *Id.* (citation omitted). And "if a violation c[an] be made
25 out on a favorable view of the parties' submissions, the next, sequential step is to ask
26 whether the right was clearly established." *Id.* A right is clearly established if "it would
27 be clear to a reasonable officer that his conduct was unlawful in the situation he
28

1 confronted.” *Id.* at 202 (citation omitted).³

2 Defendants here are not entitled to qualified immunity because Plaintiffs’
 3 pleadings sufficiently allege that Defendants violated their clearly established civil rights.
 4 *Id.* at 201. While Plaintiffs concede that the Mesa PD obtained a warrant to search EP
 5 Pawn in relation to Mr. Ellertson’s alleged illegal activity, Plaintiffs also allege facts
 6 plausibly demonstrating that the Defendants in their seizure exceeded the scope
 7 authorized by the warrant, either converting the seized property or losing it, and
 8 unreasonably destroying the EP Pawn store during their search.

9 The scope of the right to search and seize property was defined by the warrant and
 10 exceeding that scope violates the clearly established rights of the Plaintiffs. This
 11 principle has been long established. “A seizure becomes unlawful when it is ‘more
 12 intrusive than is necessary.’” *Ganwich v. Knapp*, 319 F.3d 1115, 1119 (9th Cir. 2003)
 13 (*quoting Florida v. Royer*, 460 U.S. 491, 504 (1983)); *see also Wilson v. Lane*, 526 U.S.
 14 603, 611 (1999) (*citing Ariz. v. Hicks*, 480 U.S. 321, 325 (1987)) (“Police actions in
 15 relation to the execution of a warrant must be related to the ‘objectives of the authorized
 16 intrusion.’”); *see also Horton v. Cal.*, 496 U.S. 128, 140 (1990) (“[I]f the scope of the
 17 search exceeds that permitted by the terms of a validly issued search warrant or the
 18 character of the relevant exception from the warrant requirement, the subsequent seizure
 19 is unconstitutional without more.”) The same legacy applies to the principle that
 20 unnecessarily destructive behavior violates the Fourth Amendment. *See, e.g., San Jose*
 21 *Charter of the Hells Angels Motorcycle Club v. City of San Jose*, 402 F.3d 962, 974 977
 22 (9th Cir. 2005).

23 Thus, assuming the veracity of Plaintiffs’ factual allegations and viewing them in
 24 the light most favorable to Plaintiffs, it would be clear to a reasonable detective of the
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26 ³ The Supreme Court, in *Pearson v. Callahan*, 555 U.S. 223 (2009), receded from
 27 *Saucier*’s requirement that first a party must show a violation of a constitutional right and
 28 then, if proven, must show that the right was clearly established at the time of the other
 party’s misconduct. *Pearson* clarified that a district court is not required to apply the
Saucier two-step sequence in that order, but rather, courts may exercise their discretion in
deciding which of the two prongs should be considered first. *Id.* at 242–43.

1 Mesa PD that it would be unlawful to exceed the scope of the warrant, destroy the
2 interior of EP Pawn when Mesa PD possessed keys to open every safe and case in the
3 store, and to either fail to return seized property or to lose seized property in the Mesa
4 PD's possession. *See Saucier*, 533 U.S. at 202 (citation omitted). Defendants, therefore,
5 are not entitled to qualified immunity and the motion is denied as to Plaintiffs' § 1983
6 claim.

7 **C. Arizona's Asset Forfeiture Statute**

8 Defendants cite a number of Arizona's asset forfeiture statutes and argue that such
9 statutes immunize them against all of Plaintiffs' state law claims because they had
10 "reasonable cause" to seize Plaintiffs' property for forfeiture. *See A.R.S. § 13-4314(E)*
11 ("If it appears that there was reasonable cause for the seizure for forfeiture . . . the
12 claimant is not, in such case, entitled to costs or damages, nor is the person or seizing
13 agency that made the seizure . . . liable to suit or judgment on account of such seizure . . .
14 ."). They assert that "reasonable cause" is established as a matter of law since Mesa PD
15 acted under the authority of a warrant based on probable cause.

16 Defendants' arguments are premature. A motion to dismiss attacks a plaintiff's
17 pleadings. Yet, these arguments ignore the pleaded facts and instead require this Court to
18 look beyond the FAC and into the details of the Mesa PD's search warrant and the police
19 department's implementation of it as well as other resulting behavior. Defendants'
20 contentions also rely on resolving factual disputes in favor of Defendants, *i.e.*, to
21 determine the existence of "reasonable cause" (§ 13-2314(E)), or to determine whether
22 Mr. Ellertson, and implicitly EP Pawn, were actually involved in racketeering (*see In re*
23 *1996 Nissan Sentra*, 201 Ariz. 114, 118, 32 P.3d 39, 43 (Ariz. Ct. App. 2001)), or to
24 determine whether the seized property did in fact facilitate the commission of the
25 underlying offense (§ 13-2314(G)(3)). All of these inquiries may be appropriate on a
26 motion for summary judgment but not on a Rule 12(b)(6) motion. Here, the Court
27 assumes all of Plaintiffs' allegations to be true; thus,, Defendants' arguments do not
28 support dismissing Plaintiffs' FAC on the ground that Arizona's forfeiture statutes may

1 legally immunize Defendants from liability on an undisputed factual record.

2 **D. Timeliness of Plaintiffs' Notice of Claim**

3 Under A.R.S. § 12-821.01(A), “[p]ersons who have claims against a public entity
 4 . . . or a public employee shall file claims with the person or persons authorized to accept
 5 service for the public entity . . . or public employee . . . within one hundred eighty days
 6 after the cause of action accrues.” Accrual occurs “when the damaged party realizes he
 7 or she has been damaged and knows or reasonably should know the cause, source, act,
 8 event, instrumentality or condition that caused or contributed to the damage.” § 12-
 9 821.01(B). The notice requirement is strictly construed. *See, e.g., Harris v. Cochise*
 10 *Health Sys.*, 215 Ariz. 344, 352, 160 P.3d 223, 231 (Ariz. Ct. App. 2007) (“Compliance
 11 with the notice provision of § 12–821.01(A) is a ‘mandatory’ and ‘essential’ prerequisite
 12 to such an action . . . [and f]ailure to comply with the statute is not cured by actual notice
 13 or substantial compliance.”) (citations omitted). A timeliness defense can be raised and
 14 resolved on a motion to dismiss if it is evident from the face of the complaint that a claim
 15 is time barred. *See Anson v. Am. Motors Corp.*, 155 Ariz. 420, 421, 747 P.2d 581, 582
 16 (Ariz. Ct. App. 1987). Courts determining an accrual date on a motion to dismiss assume
 17 the truth of the complaint’s facts and then evaluate each cause of action individually.
 18 *See, e.g., Dube v. Likins*, 216 Ariz. 406, 412, 167 P.3d 93, 99 (Ariz. Ct. App. 2007);
 19 *Ledvina v. Town of Marana*, 2015 WL 464384, at *10 (D. Ariz. Feb. 4, 2015).

20 Defendants argue that any of Plaintiffs’ state law claims related to the Defendants’
 21 initial June 20, 2013 search of Mr. Ellertson’s car and seizure of \$100,000 in jewelry are
 22 time barred since Plaintiffs filed their notice of claim on September 22, 2014—well over
 23 180 days since the incident. Yet, the MCAO did not file its forfeiture action against
 24 Plaintiffs’ seized property until May 22, 2014, and the City of Mesa did not return
 25 Plaintiffs’ seized property until months after the conclusion of the forfeiture action
 26 marked by the state court’s entry of a partial stipulated judgment.

27 It is not evident from Plaintiffs’ FAC that his negligence claim, as it relates to the
 28 \$100,000 in jewelry, is time barred under § 12-821.01(A). Moreover, analyzing the

1 FAC's allegations of negligence suggest that it accrued later than June 20, 2013—the
 2 date of the seizure. Plaintiffs allege that “Defendants had a duty to take adequate
 3 precautions to safeguard Plaintiffs’ property, including . . . extremely fragile jewelry,”
 4 and then breached that duty when, as Plaintiffs seem to allege, the Mesa PD returned the
 5 jewelry damaged. Assuming those allegations to be true, then the accrual date, or the
 6 date “when the damaged party realizes he or she has been damaged,” would be the date
 7 of the jewelry’s return—a date much later than the date of the initial seizure. Either way,
 8 at this juncture in the litigation, it is not clear enough to this Court that Plaintiffs’ claims
 9 related to Defendants’ first search and seizure are time barred. Finally, Defendants
 10 present case law holding that claims of illegal search and seizure accrue at the time of the
 11 search, *see Venegas v. Wagner*, 704 F.2d 1144, 1146 (9th Cir.1983); however here,
 12 Plaintiffs’ claim of negligence is divorced from the search and seizure itself, but rather
 13 relates to the Mesa PD’s treatment of Plaintiffs’ property long after the incident. As
 14 such, Plaintiffs’ claim is not unquestionably governed by *Venegas*’ search and seizure
 15 accrual timeframe.

16 Consequently, the Court denies Defendants’ motion to dismiss based on § 12-
 17 821.01(A)’s time bar.

18 **E. Impact of the State Court’s Partial Stipulated Judgment**

19 Defendants contend that Plaintiffs are barred from bringing this action because
 20 they entered into a partial stipulated judgment as a result of the forfeiture action. (Doc.
 21 13, Ex. 4.) Defendants make two points. First, Defendants assert that Plaintiffs entered
 22 into a contractual release of claims when they agreed to the partial stipulated judgment.
 23 Second, Defendants argue that the doctrine of res judicata bars Plaintiffs’ claims.

24 Defendants’ first argument mischaracterizes the language of the partial stipulated
 25 judgment, which only disposes of the seized property being held by Mesa PD, and then
 26 states that both parties to the judgment will bear their own costs and both parties waive
 27 their right to appeal the judgment. (*Id.*) Plaintiffs’ FAC, on the other hand, neither raises
 28 an issue with the costs related to the forfeiture action nor is it a de facto appeal of the

1 judgment, *i.e.* it does not argue for some amendment to or reversal of the judgment.
 2 Accordingly, no contractual release is applicable to this action.

3 As to res judicata, or claim preclusion, the doctrine provides that a final judgment
 4 on the merits bars further claims by the parties or their privies based on the same cause of
 5 action. *See Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency*, 322 F.3d 1064,
 6 1077 (9th Cir. 2003). Res judicata does not apply here for various reasons, foremost
 7 being that there is no commonality of claims between the partial stipulated judgment in
 8 the forfeiture action and Plaintiffs' FAC before this Court. The partial stipulated
 9 judgment dispensed with specific seized pieces of property and ordered that they be
 10 returned as part of an *in rem* proceeding. The FAC, on the other hand, raises nine causes
 11 of action alleging civil rights violations and tortious conduct by Defendants. No portion
 12 of either document invokes the doctrine of res judicata. The argument is thus denied.

13 **F. Prosecutorial Independence**

14 Defendants' argument that the principle of prosecutorial independence precludes
 15 Plaintiffs' § 1983 claim confuses Plaintiffs' FAC and is thus inapposite. Plaintiffs' FAC
 16 does not challenge the validity of the Mesa PD's search warrant and thus does not
 17 conflict with the principle of prosecutorial independence. Rather, Plaintiffs' FAC, in
 18 part, alleges that while under the color of a valid warrant the Mesa PD overstepped their
 19 authority when they seized items unrelated to the Mesa PD's investigation and indictment
 20 of Mr. Ellertson and then proceeded to either damage or lose those items while they were
 21 in their possession. The protections afforded by the principle of prosecutorial
 22 independence are, therefore, inapplicable and do not support dismissal.

23 **G. Plaintiffs' State Law Claims**

24 **1. Defamation and False Light Invasion of Privacy**

25 Plaintiffs raise both a defamation and false light claim against Defendants. While
 26 Defendants fail to challenge the adequacy of Plaintiffs' pleadings,⁴ Defendants do raise

27
 28 ⁴ Defendants, in their reply brief, do make the argument that the statements
 Plaintiffs cite in their complaint "are not 'statements' that can support a defamation
 claim." Beyond that bare legal conclusion, Defendants provide neither further argument

1 the shield of qualified immunity, and argue that statements made by a detective to a third
 2 party that are allegedly defamatory can fall within a detective's qualified immunity from
 3 civil liability that is created by Arizona case law. *See Portonova v. Wilkinson*, 128 Ariz.
 4 501, 503, 627 P.2d 232, 234 (1981). That is true; however, “[i]n Arizona an occasion for
 5 a publication is conditionally or qualifiedly privileged where circumstances exist which
 6 cast upon a defendant the duty of making a communication to a certain other person to
 7 whom he makes such communication in the performance of such duty.” *Id.* (citation
 8 omitted). Defendants bear the burden of establishing the factual predicate for the
 9 qualified immunity. *See id.* Here, Defendants fail to establish that the statements made
 10 by Detective Lien, Detective Berry, and other detectives of the Mesa PD to the press
 11 constitute a communication in the performance of their official duties as detectives.
 12 Moreover, to even make that argument Defendants would need to call on facts outside the
 13 pleadings thus the argument is not appropriate to a motion to dismiss.

14 Defendants' final argument raising the defense of substantial truth also relies on
 15 facts outside of the pleadings. *See Manriquez v. City of Phoenix*, 2014 WL 1319297, at
 16 *14 (D. Ariz. Mar. 31, 2014). In order to establish substantial truth, the argument
 17 requires the consideration of facts outside the pleadings to prove that Defendants'
 18 statements to the press were imbued with truth. Consequently, Defendants' motion to
 19 dismiss is denied as to Plaintiffs' defamation and false light invasion of privacy claims.

20 **2. Intentional Infliction of Emotional Distress and Tortious
 21 Interference with Business Expectations**

22 Plaintiffs raise an intentional infliction of emotional distress (“IIED”) and a
 23 tortious interference with business expectations (“TIBE”) claim. Defendants essentially
 24 assert the same counter-argument against both claims. Defendants argue that because
 25 Mesa PD acted incident to a valid warrant based on probable cause, Defendants' actions
 26 were lawful and thus cannot meet the extreme and outrageous standard required by
 27

28 nor any authority supporting their claim, thus it does not persuade this Court to rule
 differently.

1 Plaintiffs' IIED claim. Similarly, Defendants argue that because they acted lawfully
2 under a colorable warrant, Plaintiffs cannot prove that the Defendants acted with
3 "improper motive or means" and intentionally conflicted with Plaintiffs' business
4 expectations. *See Neonatology Assocs., Ltd. v. Phoenix Perinatal Assocs. Inc.*, 216 Ariz.
5 185, 187, 164 P.3d 691, 693 (Ariz. Ct. App. 2007).

6 Plaintiffs' IIED claim argues that by accosting Plaintiff Zan Ellertson when he
7 arrived at EP Pawn during the search and seizure, disseminating false information about
8 Plaintiffs', and giving out Plaintiffs' personal information, Defendants engaged in
9 extreme and outrageous conduct resulting in Plaintiff suffering severe emotional distress
10 and physical illness. Plaintiffs' TIBE claim alleges that by destroying the EP Pawn store
11 and defaming Plaintiffs in the press, the Defendants interfered with Plaintiffs' business
12 expectations. The validity of the Mesa PD's search warrant is not challenged in either
13 claim; thus, the warrant's validity does not absolve the Defendants of liability as a matter
14 of law. The motion is denied as to those causes of action.

15 **3. Negligence**

16 Plaintiffs allege a negligence claim against Defendants for their failure to
17 adequately care for and keep track of Plaintiffs' property seized from Mr. Ellertson's car
18 and EP Pawn. Defendants contend that notwithstanding whether Defendants in fact acted
19 negligently, Arizona law does not recognize simple negligence claims against police
20 officers for their discretionary decisions and conduct while engaging in police activity.
21 *See Landeros v. City of Tuscon*, 171 Ariz. 474, 831 P.2d 850 (Ariz. Ct. App. 1992).
22 Specifically, Defendants argue that because the Mesa PD, in the course of their police
23 conduct, made the discretionary decision to search EP Pawn and seize 1200 pieces of
24 property, Defendants are immunized from liability for negligence. Negligence claims
25 related to a police department's discretionary decisions made in the course of their
26 official duties, *e.g.*, to investigate or arrest an individual, are not recognized under
27 Arizona law. *See id.* at 852 ("As far as simple negligence [in a police officer's
28 investigation of a crime] is concerned, we believe the public interest mandates a rejection

1 of such a tort.”); *Wright v. City of Phoenix*, 2011 WL 4071993, at *4 (D. Ariz. Sept. 13,
 2 2011) (“[P]olice officers are not liable for mere negligence when arresting civilians . . .
 3 .”). Yet unlike the plaintiffs in *Landeros* or the other cases Defendants cite, Plaintiffs do
 4 not allege that the Mesa PD is liable for negligently investigating and then searching EP
 5 Pawn. Rather, Plaintiffs assert that Defendants acted negligently in their care and return
 6 of Plaintiffs’ property. The allegation, therefore, falls outside the immunity created by
 7 *Landeros* since it does not raise a negligence claim related to the Mesa PD’s discretionary
 8 decisions while acting in their official duty as police officers.

9 One paragraph of Plaintiffs’ negligence allegation, however, does seem to fall
 10 within *Landeros* and its progeny’s bar on simple negligence claims. Paragraph 97 states
 11 that the Mesa PD essentially breached their duty of care when they overstepped the scope
 12 of its search warrant when it seized “everything of value” at EP Pawn. No liability can
 13 attach to the Mesa PD’s discretionary decision to seize Plaintiffs’ property pursuant to a
 14 valid warrant based solely on a theory of simple negligence; rather, Plaintiffs must allege
 15 facts showing wanton or gross negligence. *See Landeros*, 831 P.2d at 851. Defendants’
 16 motion is therefore granted to the extent Plaintiffs’ negligence claim attaches liability to
 17 the Defendants’ decisions made in the course of their official duties; otherwise, the
 18 motion is denied.

19 **4. Negligent Training and Supervision of Employees**

20 Plaintiffs argue that the City of Mesa is liable for the torts of the Mesa PD’s
 21 detectives and their failure to adequately train and supervise Detective Lien, Detective
 22 Berry, and other Mesa PD detectives who caused Plaintiffs to suffer damages. “For an
 23 employer to be held liable for the negligent hiring, retention, or supervision of an
 24 employee, a court must first find that the employee committed a tort.” *Kuehn v. Stanley*,
 25 208 Ariz. 124, 130, 91 P.3d 346, 352 (Ariz. Ct. App. 2004) (citation omitted). Plaintiffs
 26 have adequately pleaded various tortious allegations against Defendants. Furthermore,
 27 Detective Lien, Detective Berry, and other Mesa PD detectives are all employees of the
 28 City of Mesa. *See cf. Picht v. Peoria Unified Sch. Dist. No. 11 of Maricopa Cty.*, 641 F.

1 Supp. 2d 888, 898 (D. Ariz. 2009) (rejecting plaintiff's negligent supervision claim since
2 the court had previously rejected the underlying tort claim the plaintiff alleged against the
3 employer's employee).

4 Defendants, argue, however that Plaintiffs must also allege facts showing that the
5 City of Mesa knew that Defendants lacked competency and were therefore a risk to
6 others. *See Quinonez for & on Behalf of Quinonez v. Andersen*, 144 Ariz. 193, 197, 696
7 P.2d 1342, 1346 (Ariz. Ct. App. 1984). *Andersen's* requirement that the employer
8 possess some amount of knowledge of the employee's incompetency applies specifically
9 to claims of negligent *hiring*; but, the case law does not support extending the
10 requirement to Plaintiffs' claim for negligent training and supervision. Accordingly,
11 Plaintiffs' allegations of negligent training and supervision of employees are adequate to
12 sustain this motion to dismiss.

13 **5. Conversion and Wrongful Taking**

14 Plaintiffs allege a conversion and wrongful taking claim as counts five and nine of
15 their FAC. Since Defendants overall immunity arguments are denied, and Defendants
16 otherwise fail to address either of these issues directly, the claims survive.

17 **IT IS HEREBY ORDERED** that Defendants' Motion to Dismiss (Doc. 13) is
18 granted in part and denied in part.

19 Dated this 8th day of January, 2016.

20 
21 Honorable G. Murray Snow
22 United States District Judge
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